Conundrums in the Use of Visual Research Methods and Products in Native Title Claims

Introduction

Over the course of three months at the end of 2017, I interned and worked at a Native Title Representative Body (NTRB) for the first time. It was my interactions with photography and film during that period that led to a two-week research placement at the Centre for Native Title Anthropology (CNTA) at the Australian National University in Canberra. Since the attitude towards these visual tools seemed neglectful at worst and ambivalent at best, I wondered what their purpose was within native title research. Were they being undervalued and therefore underutilised or were they perhaps only superficially useful? This paper seeks to begin to understand the complicated relationship between anthropological research in native title and photography and film as research tools, and is the product of my placement at CNTA. My research involved interviewing a series of highly experienced consultants and reviewing relevant literature and documents under the supervision of Dr. Julie Finlayson and Professor Nicolas Peterson of CNTA.¹

¹ Interviewees were David Thompson, Daniel Leo, Caro Macdonald, Peter Sutton, Jodi Neale and Lee Sackett.
Methods of visual research in native title

Are photography and film common tools in anthropologists’ research toolkits? Are they being used at all, and if so, do Rep Bodies require it or is it optional? The answers to these questions vary. However, while photography is ubiquitously used as a research tool, film remains a largely untouched medium for many anthropologists (with clear exceptions, as will be discussed). Due to its universality, photography was chosen as the initial focus. Three recurring themes regarding consultants’ usage were identified: documentation, illustration and posterity.

Documentation

The subject matter of consultants’ photography tends to focus on three features: people, cultural sites and material information/artifacts. This type of documentation creates records of specific moments in time and is similar to the anthropological field notebook. However, the information to be gained from photographs is quite different from written notes. For instance, photos of:

- informants give personality and life to biographies;
- cultural sites contextualise descriptions of land and events;
- material documents in the field (written notes/genealogies/photographs/etc.) bypass problematic methods of transmission in the field, such as photocopying;
- artifacts preserve the original source data.

In a way, documentation in this sense acts much like preservation evidence and in fact could be utilised as such.

Illustration

‘To illustrate’ is the omnipresent phrase used in conjunction with the justification of photography in native title. While it does not visualise native title per se, photographs are used ‘to illustrate’ claims in a way that personalises and engages its audience (i.e. the court), something that written text struggles to replicate. By depicting claimants, country and activities on country in photographs, there is an opportunity for more visceral engagement with such evidence. Consultants point to this function repeatedly and stress the importance of photography’s power to give life and authenticity to material. To quote one interviewee, “it’s illustrative and you use the best pictures in the best possible way to depict and illustrate what the report is setting out.”

Posterity
The majority of the photographs produced by consultants working in the field typically end up only in personal archives. None of the consultants could list an occasion when NTRBs had requested access to their photographs, yet they have accumulated anywhere from a few to thousands of photographs over decades of field work in native title. Consultants occasionally draw from these archives for use in connection reports; however, those photos are retained by Rep Bodies in isolation from the rest. While not every consultant is an avid photographer, the fact that every consultant I interviewed had a collection of photographs speaks volumes of a deep-seated photographic practice in anthropology. The notion that these images will serve as historical records for the future is a key driving force in the creation of these personal archives that are not ‘required’ by Rep Bodies.

While the above is a brief summary of the ways the consultants I interviewed use photography, there are dramatic variances in attitude and the extent of usage, ranging from outright advocacy to general ambivalence, which closely correlates with how much investment is placed in the practice.

Evaluating the use of film within native title exacerbates these differences, and there is an underlying hesitancy in its usage across the board. Many of the consultants interviewed had never independently engaged with film, which suggests that film is not recognised as a relevant or viable option. Of those who had not, one perceived film as unnecessarily “tricky” due to two factors: difficulty when being asked by the state, Land Councils or opposing parties to retrieve relevant film material and management of potentially sensitive material in film. In my mind, it is unclear why these obstacles are peculiar to the use of film and not all documentary sources. Audio recordings, and even lengthy written notes, would have to go through similar processes of retrieval and censorship. For example, voice recordings can be just as easily identified as their visual counterparts, i.e. cameos on film.

One person who has made extensive use of film in native title claims is Caro Macdonald. Her background in visual anthropology situates her in a unique position and has resulted in the creation of connection report videos. These films have been successfully used in consent determinations during the mediation process as important complementary material. Without the challenges that litigated court cases bring, as discussed below, claimants are allowed to contribute evidence which humanises and therefore strengthens claims.

The production of a connection report film requires collaboration between experienced native title anthropologists and ethnographic filmmakers, opportunities to film on country and access to external visual resources (audio/film/photos) related to the claim group (Macdonald 2012: 1). Macdonald promoted the use of film in native title in a presentation at the Australian Anthropological Society conference in 2012. One way she sets out to justify the presence of film in native title is by referring to several key issues related to the gap between Non-Indigenous and

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2 These claims include: Jones on behalf of the Yinhawangka People v State of Western Australia [2017] FCA 801, Limmerick on behalf of the Ngarlawangga People v State of Western Australia [2016] FCA 144, WF (Deceased) on behalf of the Wiluna People v State of Western Australia [2013] FCA 755 and Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia [2008] FCA 944.
Indigenous experiences throughout the claim process. Native title is the product of Australian law and operates under Australian legal system. Translating traditional Aboriginal law into the terms of the Australian system will only ever be an “approximate representation” given language and cultural barriers. However, it is suggested that film (along with other non-written evidence) can work to bridge some of these gaps due to its ability to “disrupt Western legal notions of property law” by challenging the singular modality of Western legal rhetoric (Anker 2005 cited in Macdonald 2012: 3). For example, song, dance and painting can be identified as law in the Aboriginal context, whereas such meaning would be alien in the Western context.³

Taking one step closer to understanding these intercultural truths, the development of an anthropology of the senses (hearing/seeing/etc.) embraces the “body [as] the ethnographer’s research instrument” as described by Sarah Pink (Macdonald 2012: 4). This line of inquiry necessitates physical presence “in the same way that a younger member of a claimant group may listen to an elder telling a story or song” (Macdonald 2012: 4). In native title cases, bringing the court to country and recreating that experience would encourage a more sensory, and perhaps personal, transmission of cultural knowledge. As Macdonald eloquently explains, “the interconnectedness of story and place” necessitates “transmission of knowledge [that] is felt rather than simply thought” (Macdonald 2012: 4). If, however, being on country is not logistically possible or wanted, film of country and/or claimants on country provides a way to elicit similar feelings of attachment, unlike written texts. This passage from Macdonald’s paper is particularly illuminating:

[E]thnographic filmmaker David MacDougall suggests that it is visual – versus written – anthropology that is “particularly suitable to representing [these] sensory and embodied approaches to anthropology”. So these experiential elements of native title anthropology . . . may be better suited to ethnographic reportage in a filmic, versus written, connection report. MacDougall proposes it is the synaesthetic qualities of visual anthropology, visual media as opposed to written words that are particularly attuned to ‘evoking’ experience, in ‘a language metaphorically and experientially close to . . . emotions, time, . . . the senses, . . . and individual identity’ (2012: 4).

Film can also provide a non-threatening platform for Indigenous voices to be heard on country where formal courts can be a source of intimidation (Macdonald 2012: 3). Conversely, the same could be said for judges who may be uncomfortable venturing into remote parts of Australia for claim-related work. During one of my interviews, a consultant related a case where a judge was disinclined to go out on country, but on country evidence was needed. As a compromise, the Federal Court was sent instead with instructions to film country that could later be used as elicitation for cross examination.

While I believe Macdonald makes a strong case for increased use of film in the native title process, there are two questions that spring to mind: why was such a defence needed and why does film continue to lag behind in anthropological research methods?

**Issues facing photography & film within native title**

³ For a more detailed discussion on the way in which cultural artefacts can challenge Western legal norms, see Anker 2005.
Issues with visual research within native title anthropology further complicate historical issues with visual research within the discipline of anthropology. In other words, all the issues with the usage of photography and film in anthropology overlap the issues with its usage in native title anthropology, but the reverse statement is not true. Understanding the relationship anthropology has with photography and film on a historical level therefore provides needed context for any discussion involving visual research methods. The scope of this project limited the current investigation of the nuances and reactions of this history (there is an entire discipline devoted to its study), but it is vital that a condensed version be included to highlight the complexities anthropology continues to grapple with in the use of photography and film.

**History of photography in anthropology**

Christopher Pinney (2011) presents a historical and theoretical account of developments in the use of photography in anthropology. He begins by pointing out the temporal correlation between photography and anthropology as disciplines that evolved over similar timespans. Britain and France in the mid-nineteenth century saw both the formation of “institutional practices that claimed the name of ethnology and anthropology” and the introduction of photography; an overlap that would go on to heavily influence methodologies in both practices (Pinney 2011: 21).

It might be argued that photography served as the perfect foil to the methodological dilemmas anthropology of that day faced: namely, the linguistic barriers between researcher and subject and a distrust of “native testimony” as reliable accounts of ‘fact’ (Pinney 2011: 14). Furthermore, there was both a physical and intellectual separation between observer of culture and theoriser - the former, “missionaries, traders or colonial administrators,” would send information back to the latter’s, the theorists, place of study for examination (Pinney 2011: 15). Photography, a new technology based in science, allowed easy transfer of data between these spheres and, moreover, was regarded as “seared with reality” in a way that previous methods could not achieve (Pinney 2011: 15).

The importance placed on visual materials can be embodied more broadly by E.B. Tylor’s assertion that these materials offered insights that “‘no verbal description can attain to’: that habit of constant recourse to actual objects is of inestimable use to us in the more abstract investigation of ideas . . . the sight of material things . . . gives a reality and sharpness of appreciation which add much to the meaning of words” (Tylor cited in Pinney 2011: 32). This was particularly true given the importance of technology in defining a group’s place on the social evolutionary ladder. Tylor also wrote “instructions for the use and transport of the photographic apparatus” to be published in the second edition of *Notes and Queries on Anthropology* in 1892 (Pinney 2011: 29). Four years later, Maurice Vidal Portman subsequently added that the management of photos should be attended to and that there should be a system of organization and annotation of materials (1896 cited in Pinney 2011: 41).
By the early twentieth century, anthropology’s shift to Malinowskian functionalism and the beginning of participant-observation marks the decline of photography in anthropological publications, although it did not stop them taking photographs. Suddenly, researcher and observer were one and the same, and the role photography played as intermediary was rendered both unnecessary and undesirable. Pinney effectively suggests that there was an “internalisation” of photographic practices with the focus on social relationships, and ethnographers began translating their ‘exposure’ to culture into written publications (2011: 62).

The subsequent critique of photography in anthropology is extensive and ongoing and the following reflects only some of the points that Pinney makes. For example, unlike written text that can be altered or vague, “every photograph [is] indisputably a document of an event, an event that could not be denied” and alone “is incapable of making distinctions about the relationship of its visual trace to psychic, social or historical normativity” (Pinney 2011: 80-81). Additionally, anthropologists struggle to determine whether photography contains too much or too little information and the effects of commercial photography coupled with better technology that is easily accessible has left photography vulnerable to a perceived shallowness. Finally, Pinney notes the impacts of colonialism had also infiltrated both visual archives and present day practices. The ‘white man’ surveilling ‘natives’ from afar has ethical, historical and methodological implications.  

**Impact on native title**

Rep Bodies commissioning research do not require photography or film and there are no comprehensive anthropological guidelines that exist to create accountability and consistency when visual research methods are used in the field of native title. It is important to stress ‘anthropological’ protocols, as there are legal restrictions, which will be discussed below. Furthermore, there is no official analysis of the use of photography/film in native title as a historical process over almost three decades of work. This has led me to the conclusion that this absence is a reflection of anthropology as a discipline, rather than having anything to do with native title anthropology.

Even a brief interlude into the history of visual media in anthropology yields immediate clarity when considering the uncertain status of photography and film in native title. The post-functionalist philosophies of today continue to battle through the theoretical and ethical quagmire that has become entrenched in visual research methods. Following on from a contentious history, visual anthropology largely serves as the arena for this struggle today. This line of inquiry has yet to infiltrate native title practices, however, so the debate remains distant.

Another historical implication becomes evident when one looks at standard anthropology courses being taught in universities. There is a distinct lack of applied anthropological training,

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4 Modern technology has somewhat combated this phenomenon. Aboriginal people take photos and videos on mobile phones that they can personally circulate among groups, as anthropologists have observed in native title claims during site visits.
both in and outside of native title education, including the use of photography and film as research tools. Without support at the institutional level, the hope for new anthropologists entering native title work to initiate dialogue about visual research is greatly diminished, not to mention that their capabilities with the technology visual research entails will be extremely limited.

**Visual research within the legal realm of native title**

The tension between anthropologists employed in native title and their legal counterparts affects every level of research and visual methodology is no exception. Interestingly, state guidelines for preparing connection material only superficially address usage of photography and film in the claim process. For example, the current guidelines for Queensland affirm photographs “may also be provided, . . . ideally . . . as annexures to the connection report . . . Audio and visual material (e.g. YouTube) may also be relied upon, and should also ideally be referred to and discussed in the report” (Queensland Government, Department of Natural Resources and Mines 2016: 6). Furthermore, expert reports containing photographs must give those photographs to “other parties” (Queensland Government, Department of Natural Resources and Mines 2016: 43).

In Western Australia, the guidelines state “Connection evidence can be presented in a mixture of media or forms. This includes the use of photographic, video and audio recordings” (Government of Western Australia, Department of the Premier and Cabinet 2012: 3). There appears to be little objection to the inclusion of visual material based on these protocols; however, in actuality, lawyers and anthropologists face several challenges when bringing such material into court.

One common concern of lawyers is the possibility of prior inconsistent evidence. This concept is not new or unique to film, as there has been an ongoing history regarding the perceived risk of oral evidence in native title. For example, preservation evidence before a trial fits this risky profile. People may outlive expectations and have to be cross-examined based on evidence given some time ago, making it vulnerable to change (Neate 1989 cited in Byrne 2002: 13). Though it is possible for inconsistency to be explained to a court’s satisfaction by expert anthropologists, lawyers would be reticent to encourage such exposure. Another point of concern for lawyers is the process of discovery, when report materials may have to be turned over to the court and opposing side. For instance, if sections of film were edited out with the intention of concealing information, those sections would then have to be examined as evidence and could weaken a case.

The nature of film is especially worrisome to lawyers, as Robert Blowes raised during my interview with him (2018, pers. comm. 16 February). He expressed the view that film in particular is complicated because it is “less forgiving” and perceived as the absolute truth. This viewpoint is not dissimilar to an earlier quote in the history of photography: unlike written text that can be altered or vague, “every photograph was indisputably a document of an event, an
event that could not be denied” (Pinney 2011: 80-81). As a means of risk management, Blowes stressed the need for diligent consideration when deciding what is used by the researcher, as those materials can be cross-examined in court. He also emphasised the importance of mutual understanding between lawyer and anthropologist through open dialogue. Furthermore, if film is to be used as evidence, explicit instructions must be defined in advance by the lawyer, including making sure all people involved in the conversation are visible in the film, the lawyer is asking the questions, the camera is not turned off, nor the image reframed during filming. Following these measures will theoretically reduce any perceived risk of manipulation. Management on this level, however, may result in curtailed opportunities for the use of film in research, if it is seen more as a liability than an asset.

Another fundamental obstacle to visual materials making substantial headway in the court is the historical precedence Western legal systems place on written text. As alluded to earlier, a chasm exists between Western and Indigenous concepts of knowledge and law, and “the tendency of Western judicial discourse to value written traces of the past over other traces, for example individual memory, story, dance and visual art, often suppresses and obscures minority voices” (Choo 2004: 198). This sentiment is echoed in the responses from participants in “Getting Outcomes Sooner,” a native title connection workshop for professional anthropologists and lawyers funded by the NTRU, AIATSIS and NNTT in 2007. Participants recognized the potential for marginalisation of Indigenous voices due to the focus on written text in claims and suggested increased use of technologies, such as DVDs and photographs, could help mitigate the situation (Ferrell, Catlin & Bauman 2007: 17). However, attendees cited uncertainty in relation to government policies and interpretation of such forms of evidence. Eleven years later such ambiguity remains.

A specific example that illustrates how Western notions of knowledge and law failed to meaningfully engage with non-written evidence can be seen in *De Rose v South Australia*. Craig Elliott, who provides an insightful critique of the case, observes that during the claim process, songs about dreamings and culturally significant sites were offered freely and in good faith until frequent objections and their ready dismissal by O’Loughlin J due to their spontaneity, secret nature and subsequent lack of recordings. Yet when these songs were later recorded, acting directly against traditional law, for evidential purposes, they still ultimately “occupie[d] the place of the other” and were “understood as not normal, peripheral, eccentric and difficult” forms of evidence because they did not easily integrate into the dominant legal discourse (Elliott 2016: 14). As Elliott notes, this interaction transpired under Federal Court rules allowing the use of singing as evidence, which demonstrates how cultural ignorance (particularly in adversarial

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5 For a more detailed itemisation of technical issues, see Jo-Anne Byrne’s *The Perpetuation of Oral Evidence in Native Title Claims* (2002, pp. 35-36).

6 *Peter De Rose & Others v State of South Australia & Others* (No SG 6001 of 1996); *De Rose v State of South Australia* [2003] FCAFC 286 (16 December 2003); *De Rose v State of South Australia* (No 2) [2005] FCAFC 110 (8 June 2005), par.8; *De Rose v State of South Australia* (No 3) [2005] FCAFC 137 (28 July 2005).
conditions) can render such rules completely ineffective (Elliott 2016: 14). While singing, and other performances such as dancing and painting, may act and reveal law for Aboriginal peoples, its translation into Western legal evidence becomes shallow since there is no equal comparison. Though there was a successful appeal, this case illustrates the courts’ resistance to non-written forms of evidence with severe ramifications for the strength of cases and claimants’ goodwill. Furthering the point that Western legal systems overlook non-written material is the distinct lack of commentary from judges in official judgements. One of the consultants I interviewed has been involved with six different claims that significantly involved film and only one judge supplied further remarks other than simply stating the film’s existence in conjunction with connection material. Whether this is due to rooted suspicions of reliability when presented with film or a lack of consideration is unclear, but there seems to be a pointed absence of emphasis on its role in determinations.

Management of visual material

How researchers and NTRBs manage visual material raises huge practical and ethical concerns and is something that requires much consideration. This paper will only identify three: storage, annotation and repatriation.

Storage

The storage capacity and methods of NTRBs and researchers for visual material runs parallel to debates about storage of connection material at large. As documents are being created, where and how are they being stored? Are the documents physical or digital, and should physical material be digitised? The needs of physical documents are very different to digital documents; for example, a paper photograph stored in an outdoor shed is susceptible to changes in temperature, weather, fire, etc. and a controlled environment is rendered virtually impossible. Similarly, technology is faulty and if a digital photograph is only saved to one place there is a risk that the file will become corrupt and vanish from existence altogether. The capacity of storage places is also variable for both physical and digital documents. Most NTRBs are not well equipped to serve as fully functioning local archives with dedicated libraries and appropriate archival technology. Conversely, sending materials elsewhere, such as to the AIATSIS, is not an easy solution as access becomes complicated by confidentiality, technicalities and distance.

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7 The Federal Court Rules 2011, r 34.123, describe the circumstances in which cultural or customary evidence may be brought before the Court.
8 Lindgren J in Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31.
(Koch 2005). It is important that copies are lodged there for permanent preservation. Finally, large collections lie dormant in the personal archives of consultants.

**Annotation, Transcription & Organization**

My first experience involving research through visual material involved historical photographs from the 1950s of Aboriginal people living in regional areas of the Kimberleys in Western Australia. The striking lack of annotation made my task almost impossible. Of course, this is not a unique experience and poorly annotated historical documents are a common occurrence. What I did not understand, however, was the lack of annotation going into current archives to prevent a similar fate. Out of all the consultants I spoke with, none had begun the labour intensive project of annotating their extensive archives. Similarly, my experience in a Rep Body revealed a lack of annotation beyond compiling files into date/place marked folders. The importance of annotation is not a recent development and I can again reference earlier wisdom of 1896 in Portman’s view that “there should be a system of organisation and annotation of materials” (cited in Pinney 2011: 41). Diligent annotation is not just meaningful for further research, but also for the claimants themselves.

Perhaps even more time and resource consuming, but equally useful, is the art of transcription. Having transcriptions of videos allows for quick retrieval of specific information and clips for research purposes since there is no existing software to easily filter through hours of film. Dr. Deane Fergie stressed the need for a “way to manage info material for lawyers” and how transcriptions can sometimes mitigate the “issues with finding and using info from film” (2018, pers. comm. 20 February). Of course, putting in the effort to provide good annotations and transcriptions without a clear organisation method in mind will render them less useful. To paraphrase Fergie, knowing what you have is just as important as knowing where you have it (2018, pers. comm. 20 February).

**Repatriation**

Perhaps the most compelling reason to ensure good practice involving the use of photography and film in native title, repatriation of visual materials serves a very real and meaningful purpose. Written reports by anthropologists, full of academic and legal jargon, are arguably less valuable to claimants post-native title than photos or videos of community members. This is especially true when family histories lack much internal documentation. Visual materials are tangible results of the native title research process that occupy a common ground between researchers and informants.

The state of repatriation within the native title process, however, is very much up for debate. Conflicting rights of access and confidentiality, lack of clear guidelines from the outset of negotiations (Bauman 2010: 133) and the uncertain role of anthropologists in repatriation, leaves large archives effectively hidden due to an inability to act.
Conclusion

What this paper set out to achieve was to contextualise current visual research methods in native title and explore some of the implications and responsibilities of using such documentation. There are many additional external and internal factors germane to the anthropologist that are still unaddressed in the confines of this paper, such as: limited funding for research, access to emerging technology, ability to film/photograph and take notes simultaneously, ownership of materials, photography and film living a double life after native title as resources for future research, the role of Aboriginal people as creators of photography and film and many more. Hence this is an ongoing paper.

Ultimately, without a significant shift in attitude toward visual research, entrenched in historical practice and legal pressures, the potential for photography and film to be valuable assets both now and in the future will be stunted.

Never again will there be equalled resources devoted to Aboriginal research in Australia. While native title is far from perfect, it provides a unique opportunity both for anthropologists to conduct intense studies and for claimants to explore personal histories. With this in mind, I believe that this includes a special chance to create a lasting historical record comprised of photos and videos for future generations, documenting a paradigm shift that forever changed the Australian political and cultural landscape.

Reference List

Published Sources


Unpublished Sources


Legislation

Federal Court Rules 2011.

Policy Guidelines
